Before the

Federal Communications Commission

Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

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FILE

In the Matter of	)	
	)	
TARIFF FILING REQUIREMENTS FOR	)	CC Docket No. 92-13
INTERSTATE COMMON CARRIERS	)	

COMMENTS
OF
COMMUNICATIONS TRANSMISSION, INC.

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March 26, 1992

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TARIFF FILING REQUIREMENTS FOR INTERSTATE COMMON CARRIERS	)	CC Docket No. 92-13

COMMENTS OF COMMUNICATIONS TRANSMISSION, INC.

Communications Transmission, Inc. ("CTI"), by its attorneys, hereby respectfully submits its comments in the above-captioned proceeding. In regard thereto it is stated as follows:

CTI's Comments are submitted on the assumption that (1) in light of a Supreme Court decision in Maislin[1] the FCC will have found that, as a matter of law, all common carriers subject to the Communications Act must operate pursuant to a tariff on file with the FCC, and (2) the Congress has not amended Section 203 of the Communications Act to ratify the present system of forbearance from regulation of non-dominant carriers.

CTI's comments herein are addressed to issues (b), (c) and (d) as set forth in the Notice of Proposed Rule Making ("NPRM") in this proceeding.

A. THE CARRIER'S CARRIER TARIFF FILING EXCEPTION IS STATUTORY AND THUS ITS EXISTENCE SHOULD BE RECOGNIZED IN THIS PROCEEDING.

The very predicate of issue (b) - "does it necessarily follow that all common carriers must file tariff's" fails to recognize that not through forbearance but rather by statutory exception service provided by carrier's carriers is not subject to the requirement of tariff filing. It has been long established that as a matter of law a carrier whose facilities are being used to

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[1] Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S. CT. 2759 (1990).

provide service to other carriers need not provide such service pursuant to tariff - Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250, 1277 (3rd Cir. 1974), cert. denied, 422 U.S. 1026 (1975). Thus, it follows that "all" carriers per se need not file tariffs and this statutory exception for carrier's carriers should be recognized herein.

CTI is a carrier's carrier. The CTI interstate network is depicted in the map attached hereto. CTI has only two classes of customers.

(1) Common Carrier Customers - Such customers as Allnet, MCI, Metromedia, etc., have leased facilities from CTI for years. Ranging from DI-1's to DS-3's of digital capacity, these facilities are used by CTI's customers to provide service to their end-user customers.

(2) Private Carrier Customers - The FCC has long recognized a class of carriers who operate as private carriers. Norlight, 2 FCC Rcd 132 (1987). Such carriers do not operate pursuant to a general offering - as do common carriers - but rather provide service to their limited class of customers pursuant to long term contractual arrangements.

Since both categories of CTI's customers are carriers - either common carriers or private carriers - CTI itself provides no service to end users and thus pays no access charges. Access minutes of use are specifically delineated as being when "the originating end user's call is delivered by the telephone company and acknowledged as received by the interchange carrier's facilities connected with the originating exchange", 47 C.F.R. § 69.2(a). An "end user" is "any customers of an interstate or foreign telecommunications service that is not a carrier" (47 C.F.R. § 69.2(m)). Since CTI's customers are carriers, they are not end users. Thus, CTI is a carrier's carrier.

In Bell Telephone of Philadelphia at 1277, the Court held: "We read § 211(a) as providing another exception to the general rule of § 203(b): carriers regulated by the Act may order their business relations by contract as well as by tariff." Since CTI functions solely as a

carrier's carrier, serves no end-users; interconnects with no local exchange carriers and pays no access charges, it is a member of a unique class of carriers which need not operate pursuant to tariff. CTI respectfully submits that it does not follow that "all" common carriers must file tariffs. The class of common carriers that provide service only pursuant to contract to other carriers are by statute exempt from the tariff filing requirement.

B. **CARRIER'S WHICH HAD PREVIOUSLY PROVIDED SERVICE PURSUANT TO LONG TERM CONTRACTS SHOULD NOT BE PERMITTED NOW TO INCREASE THEIR CHANGES TO CONTRACTUALLY BOUND CUSTOMERS, UNLESS THEY FIRST MEET THE FCC's "SUBSTANTIAL CAUSE FOR CHANGE TEST".**

It has long been recognized that as a matter of law the rates and terms of service specified in a tariff take precedent over contractual arrangements. It is only in the rare case where the contractual arrangement itself has been found to be unlawful that the customer is free to elect to terminate the contract when the newly filed tariff contains egregious terms.[2]

CTI itself is a customer of non-dominant carriers such as WTG. Such carriers lease to CTI fiber facilities on a long term basis pursuant to contract. CTI then, acting as a reseller, leases portions of these facilities to CTI's customers which utilizes them, for example, to enable alternate routing to increase system reliability.

Some of the carriers from whom CTI leases fiber facilities are private carriers operating pursuant to the Norlight doctrine.[3] CTI's contractual arrangements with private carriers would not be effected by this proceeding.

However, other carriers from whom CTI's leases such fiber facilities are common carriers subject to the Communications Act. Were these carriers to be able to simply change

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[2] See, e.g., Local Exchange Carrier's Individual Case Basis DS3 Service Offerings, 5 FCC Rcd 4842 (1990).

[3] Norlight, 2 FCC Rcd 132 (1987).

the terms of their lawful contractual arrangements with CTI simply by filing a tariff as a result of this proceeding, it could have grave economic consequences. In such cases new tariff filings reflecting existing contractual arrangements should be permitted on an Individual Contract Basis ("ICB") filing. No change to the terms of these arrangements should be permitted unless the carrier has met the "substantial cause for change" test set out in the three RCA Americom[4] decisions.

The relevant principals of law, as established by the FCC in the RCA Americom Decisions are set forth below:

> The long term service arrangements found in RCA Americom's current tariff bear similarities to service contracts often entered into by unregulated firms. The carrier offers definite terms for a fixed period, most likely after negotiations with potential customers who decide whether to accept the offer based upon whether the offering meets their needs at a price they are willing to pay. The rates and the length of the service term would of course be among the most important terms for customers. In this case, the question is raised as to whether customers have chosen RCA Americom's service because of those terms, and relied upon its terms in contracting with their own customers, as well as in making investments and other business decisions.

RCA Investigation Order, 84 FCC 2d at 357.

* * *

> At the same time, a carrier's proposal to modify extensively a long term service tariff may present significant issues of reasonableness under section 201(b) of the Act which are not ordinarily raised in other tariff filings. In our judgment, the right of a carrier to change its tariff unilaterally should be viewed in a different light when the tariff itself represents, in large measure, a quasi-contractual agreement between the carrier and the customer. We have recognized in the Competitive Carrier Rulemaking the benefits which contracts bring to the carrier-customer relationship. The private negotiation process will generally, in the absence of market power, conclude in a more efficient bargain than that which our regulatory process would artificially impose. Contracts also lend certainty to the process. In contrast, any commitment reflected in a tariff would be fully binding on the customer as a

[4] RCA Americom Communications, Inc., 84 FCC 2d 353 (1980) (RCA Investigation Order); 86 FCC 2d 1197 (1981) (RCA Rejection Order); 2 FCC Rcd 2236 (1987) (RCA Reconsideration Order) jointly RCA Americom Decisions.

matter of law (Section 203, 47 USC § 203) yet the carrier would remain free to change the terms of service offering at any time. It strikes us as anomalous that a carrier could use the tariff filing process to prevent any of its service terms from being enforced against it by customers, while at the same time bind customers to all the tariff provisions for as long as the carrier wishes until expiration of the terms by operation of the tariff itself. In effect, then, the result would be an agreement that only one of the contracting parties could enforce.

If long term commitment provisions are subject to revision by the carrier at any time without cause, the continued reasonableness for rate differentials between classes of service is also called into question. The issue is raised, for example, why a long term customer should pay a lower rate than a short term customer if the carrier can change either the rates or any of the conditions of service at any time. . . .Significantly, though the current long term tariffs were purported to be reasonable just two years ago, no change of circumstances is offered as justification for revising them now.

RCA Investigation Order, 84 FCC 2d at 358-359.

This doctrine was further elaborated in the RCA Rejection Order:

Our own analysis begins with the proposition that the statutory scheme permits carriers to initiate proposed changes to their tariffs. . . .Such changes subsequently become effective unless the Commission determines, either on its initial review or after hearing, that the new provisions are unjust, unreasonable, or otherwise unlawful. It is not our intent here to modify this statutory framework, as RCA Americom seems to suggest. To the contrary, we seek only to ascertain reasonableness where a carrier provides services under a comprehensive, contract-like tariff scheme, and later seeks to modify material provisions during the term specified in the tariff. For example, a carrier's original decision to offer customers the option of obtaining service for a particular term, say six years, is of less concern than where a dominant carrier seeks to alter the length of a term, or other material provision midstream. Our statutory responsibilities dictate that we take into account the position of the relying customer in evaluating the reasonableness of the change. . . .

This brings us to the question of the justification which we would expect a dominant carrier to provide in these circumstances. In balancing the carrier's right to adjust its tariff in accordance with its business needs and objectives against the legitimate expectations of customers for stability in term arrangements, we conclude that the reasonableness of a proposal to revise material provisions in the middle of a term must hinge to a great extent on the carrier's explanation of the factors necessitating the desired changes at that particular time. If a carrier can make a showing of substantial cause, its decision to alter tariff terms will be considered reasonable.

RCA Relection Order, 86 FCC 2d 1197 at 1201-1202

(underscoring supplied).

This legal principle was affirmed by the United States Court of Appeals for the District of Columbia Circuit in MCI Telecommunications Corp. v. FCC, 665 F. 2d 1300 (D.C. Cir. 1981), wherein the Court stated:

> The "Sierra-Mobile" doctrine[4] restricts federal agencies from permitting regulatees to unilaterally abrogate the private contracts by filing tariffs altering the terms of those contracts.
>
> The FCC says the doctrine does not apply to the present Settlement Agreement because Bell's rate relationship with the OCCs was governed by tariffs, not by the Agreement. That contention is without merit. A contract, such as the Agreement here, may refer to rates included in a tariff and yet continue to enjoy protection under Sierra-Mobile. . . .Contracts and tariffs are not always mutually exclusive, but may be used in concert to define the relationship of the parties. In such circumstances, the contract governs the legality of subsequent tariff filings. "Rate obligations are valid; rate filings inconsistent with contractual obligations are invalid.

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[4]FPC V. Sierra Pacific Power Co., 350 US 348 (1956) and United States Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 US 332 (1956). (The Sierra-Mobile Doctrine).

Thus, in this proceeding CTI respectfully submits that were it to be found that tariff's must be filed, where the service is provided pursuant to long term contracts the filing should be permitted on an Individual Contract (ICB) Basis. Further, no carrier should be permitted to modify such tariff filings in the future unless it has met the "substantial cause for change test".

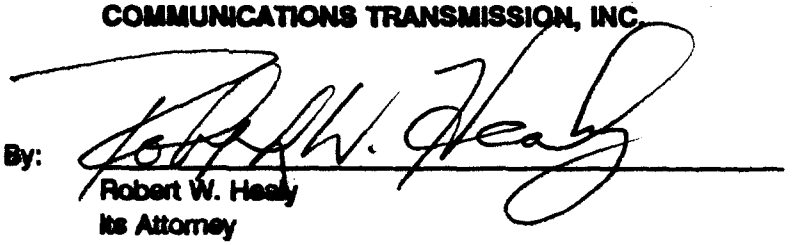
C. IF A TARIFF FILING IS REQUIRED STREAMLINED RULES SHOULD APPLY TO NON-DOMINANT CARRIERS.

Since CTI's carrier subsidiaries provide service to their customers acting only as a carriers carrier or as a private carrier in neither case should CTI be required to file a tariff or tariffs at this time. However, in future a CTI subsidiary may elect to function as a common carrier subject to the Act and then a tariff would have to be filed and become effective before

such service could be provided.

For this reason CTI submits that non-dominant carriers should not have the burden of Section 61.38 (47 C.F.R. § 61.38) filings and be permitted to have reduced notice periods. This streamlined regulation of non-dominant carriers was found to be in public interest when they had to file tariffs.[5] Nothing has changed that would suggest that such streamlined regulation would not be in the public interest now.

Respectfully Submitted,
COMMUNICATIONS TRANSMISSION, INC.

By: 
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March 26, 1992

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[5] Competitive Carrier Rulemaking, 85 FCC 2d 1, 33-40 (1980).